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No. 96-542

In the Supreme Court of the United States

OCTOBER TERM, 1996

WALTER MCMILLIAN, PETITIONER

v.

MONROE COUNTY, ALABAMA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the sheriff of Monroe County, Alabama, is a final policymaker for the county in matters of law enforcement for purposes of county liability under 42 U.S.C. 1983.

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INTEREST OF THE UNITED STATES

Section 1983 is the basic federal statute providing civil remedies for deprivations of federal rights by state and local officials. 42 U.S.C. 1983. The United States has a strong interest in ensuring that this statute is interpreted with adequate breadth to serve its intended purpose. Private parties suing under Section 1983 to enforce federal rights act not only on their own behalf, but also as private attorneys general in vindicating a policy that Congress considered to be of the highest priority. The United States filed a brief as amicus curiae in *Swint* v. *Chambers County Comm'n*, 115 S. Ct. 1203, 1207-1212 (1995), in which

the precise question raised in this case was presented but not reached because this Court concluded that the court of appeals in that case had lacked jurisdiction to consider the issue.

STATEMENT

1. In 1988 petitioner was convicted for the murder of a woman in Monroe County, Alabama. After he spent nearly six years on Alabama's death row, including over a year before his trial (Pet. App. 1a), petitioner's conviction was overturned on appeal because the prosecution failed to disclose exculpatory and impeachment evidence in violation of petitioner's due process rights. *McMillian* v. *State*, 616 So. 2d 933, 941-948 (Ala. Crim. App. 1993). The State released petitioner and initiated a new investigation to identify the murderer. Pet. App. 2a, 33a.

Following his release, petitioner filed suit in United States District Court against Monroe County; Thomas Tate, the Sheriff of Monroe County; and various state officials responsible for petitioner's arrest, imprisonment, and conviction. Pet. App. 2a. In a twenty-seven count complaint, petitioner alleged that the defendants had violated his rights under the United States Constitution, the Alabama Constitution, and Alabama statutory and common law. *Id.* at 34a-35a. The complaint alleged that Sheriff Tate had, *inter alia*, falsely arrested petitioner (First Amended Compl. ¶ 31); conspired to put petitioner on death row prior to his trial (*id.* at ¶ 19); suppressed exculpatory evidence (*id.* at ¶¶ 22, 25, 28-30); threatened and intimidated witnesses into giving false evidence implicating petitioner (*id.* at ¶¶ 23, 26-27); and falsely testified before the grand jury (*id.* at ¶ 33).

Petitioner sued Monroe County under 42 U.S.C. 1983, alleging that the county was liable for the unconstitutional acts of Sheriff Tate because the sheriff's "edicts and acts may fairly be said to represent [the] official policy [of] . . . Monroe County . . . in matters of criminal investigation and law enforcement." Pet. App. 2a (quoting First Amended Compl. ¶ 53). The complaint further alleged that the sheriff's actions "were undertaken as part of an unwritten policy and custom attributable to * * * Monroe County, Alabama, of withholding exculpatory evidence in criminal cases, of pressuring and threatening witnesses to give false testimony, of threatening and punishing potential witnesses to prevent them from giving truthful exculpatory testimony, and of instigating unwarranted and malicious criminal prosecutions." Pet. App. 51a-52a (quoting First Amended Compl. ¶ 53).[1]

Relying on the Eleventh Circuit's decision in *Swint* v. *City of Wadley*, 5 F.3d 1435 (1993), vacated *sub nom. Swint* v. *Chambers County Comm'n*, 115 S. Ct. 1203 (1995), the district court granted the county's motion to dismiss. Pet. App. 25a-76a. In *Swint*, the court of appeals held that an Alabama sheriff "is not the final repository of [an Alabama county's] general law enforcement authority, because [the county] has none." 5 F.3d at 1451. Pursuant to

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[1] Similar allegations were made against defendant Larry Ikner, an investigator for the Monroe County District Attorney's office. Pet. App. 51a-53a. Because petitioner did not appeal the district court's ruling that the county was not liable for the alleged acts of defendant Ikner, that question is not before the Court.

28 U.S.C. 1292(b), petitioner appealed the district court's order dismissing the county. Pet. App. 3a.

2. The court of appeals affirmed. Pet. App. 1a-24a.[2] The court acknowledged that, under *Monell* v. *New York City Dep't of Social Servs.*, 436 U.S. 658 (1978), a "county, or other local government entity is a 'person' that may be sued under § 1983 for constitutional violations caused by policies or customs made by lawmakers or by 'those whose edicts or acts may fairly be said to represent official policy.'" Pet. App. 5a (quoting *Monell*, 436 U.S. at 694). In addition, the court of appeals observed that "state and local positive law, as well as custom and usage having the force of law" should direct the court "to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business." Pet. App. 6a (quoting *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 125 (1988) (plurality opinion)).

The court of appeals took "a fresh look" at its decision in *Swint*, *supra*, which this Court had vacated after the district court's decision. Pet. App. 7a. According to the court of appeals, *Swint* posed the "critical question under Alabama law * * * whether

[2] Petitioner was also permitted to appeal the district court's order granting partial summary judgment to various individual defendants on petitioner's claim that they coerced prosecution witnesses into giving false trial testimony. Pet. App. 3a, 19a. The court of appeals affirmed the district court's decision that petitioner could not defeat summary judgment by offering hearsay statements that would be inadmissible at trial. *Id.* at 19a-23a. In a separate decision announced the same day, the court of appeals affirmed in part and reversed in part the district court's order denying several defendants' motions for summary judgment based on qualified immunity. *McMillian* v. *Johnson*, 88 F.3d 1554 (1996).

an Alabama sheriff exercises county power with final authority when taking the challenged action." *Ibid.* The court explained that its "examination of Alabama law revealed that Alabama counties have no law enforcement authority" because "Alabama law assigns law enforcement authority to sheriffs but not to counties." *Id.* at 7a-8a. The court then reaffirmed its decision in *Swint* and concluded that "a sheriff does not exercise county power when he engages in law enforcement activities and, therefore, is not a final policymaker for the county in the area of law enforcement." *Id.* at 8a.

The court further noted that this Court "has not addressed whether a municipality must have power in an area to be held liable for an official's act in that area," but that a "threshold question * * * is whether the official is going about the local government's business." Pet. App. 8a. The court answered that question by concluding that "the existence of county law enforcement power is a prerequisite to a finding that a sheriff makes law enforcement policy for a county." Id. at 14a. The court explained that petitioner "may be correct that, under principles of representative government, an official elected locally should not set statewide 'policy'" and that the "'policy' of a state connotes a single policy rather than one state 'policy' per county." *Id.* at 9a-10a. The court stated, however, that "when 'policy' is understood as a § 1983 law term of art, we see no reason why a county sheriff may not be a final policymaker for the state in the area of law enforcement insofar as state law assigns sheriffs unreviewable state law enforcement power." *Id.* at 10a.

The court of appeals distinguished this Court's decision in *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 483-484 (1986), in which the Court approved of the Sixth Circuit's conclusion in that case that sheriffs in Ohio set final county policy for matters of law enforcement under Section 1983. The Eleventh Circuit panel explained that "Ohio law determined the Sixth Circuit's conclusion. But Alabama law controls our conclusion." Pet. App. 11a. The court was unpersuaded by the fact that in Alabama, like Ohio, "sheriffs are elected by the residents of their counties; receive their salaries, expenses, offices, and supplies from their counties; and serve as the chief law enforcement officers in their counties." *Id.* at 11a-12a. The court reasoned that Alabama law was different because "a sheriff is a state officer according to the [Alabama] constitution" and a member of the State's executive branch. *Id.* at 12a. As such, Alabama law provides that "counties may not be held vicariously liable for sheriffs' actions." *Ibid.* (citing *Hereford* v. *Jefferson County*, 586 So. 2d 209 (Ala. 1981), and *Parker* v. *Amerson*, 519 So. 2d 442 (Ala. 1987)). Moreover, the court noted that "as state executive officers, Alabama sheriffs are protected by the state's sovereign immunity under * * * the Alabama Constitution." *Ibid.*

Finally, the court distinguished its earlier decision in *Parker* v. *Williams*, 862 F.2d 1471 (11th Cir. 1989). Pet. App. 14a-16a. *Parker* held that a county *was* liable under Section 1983 in the area of a sheriff's hiring and training jail personnel because "in practice, Alabama counties and their sheriffs maintain their

county jails in partnership." Pet. App. 14a. The court found *Parker* not controlling because "important aspects of Alabama law evincing county power in the jail maintenance area find no parallel in the law enforcement area." *Id.* at 15a.

SUMMARY OF ARGUMENT

The court of appeals erred in ruling that Monroe County could not be held liable for the unconstitutional law enforcement practices of its sheriff. Local government entities are liable under Section 1983 for unconstitutional conduct of officials who have final policymaking authority over the subject matter in question. *Pembaur* v. *City of Cincinnati*, 475 U.S. at 483-484 (plurality opinion). To determine where policymaking authority lies for those purposes, a trial court must look to state and local statutory and decisional law, as well as to custom or usage having the force of law, and identify the officials or government bodies that have final policymaking authority in regard to the particular action challenged. *Jett* v. *Dallas Indep. School Dist.*, 491 U.S. 701, 737 (1989); *City of St. Louis* v. *Praprotnik*, 485 U.S. 112 (1988) (plurality opinion). In Alabama the sheriff is elected by county voters and exercises his jurisdiction within the county. State law requires the county to pay the sheriff's salary and to fund all the operations of his office. The court of appeals therefore erred in concluding that the county could not be held liable for the sheriff's unconstitutional exercise of his authority in this case.

ARGUMENT

THE COURT OF APPEALS ERRED IN RULING THE COUNTY COULD NOT BE LIABLE UNDER SECTION 1983

A. Counties Are Liable Under 42 U.S.C 1983 For Unconstitutional Action By Their Officials Who Have Final Authority To Establish The County's Policy With Regard To The Actions Challenged

Local governmental bodies are "included among those persons to whom § 1983 applies," and therefore they may be sued under Section 1983 for monetary, declaratory, or injunctive relief when they commit a constitutional tort. *Monell*, 436 U.S. at 690.[3] A local government is liable only when it has committed the constitutional violation, however, and not merely because one of its employees commits such a violation. *Pembaur*, 475 U.S. at 478-479. The Court has emphasized that a government is responsible under Section 1983 when the injury alleged is inflicted by "execution of [the] government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy[.]" *Monell*, 436 U.S. at 694. A government may be liable for a single decision by an official if the

[3] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. * * *

official is "the official or [one of the] officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur*, 475 U.S. at 483-484 (plurality opinion). An official can derive his authority to make final policy decisions from legislation, from formal delegation from another official of entity, or from custom or usage. See *Praprotnik*, 485 U.S. at 124 & n.1.

Two decisions of the Court since *Pembaur* have described the method by which a court should determine whether final authority to make municipal policy is vested in a particular official. In *Jett* v. *Dallas Indep. School Dist.*, 491 U.S. at 737, a majority of the Court reaffirmed the analysis set forth in the earlier plurality opinion in *City of St. Louis* v. *Praprotnik*, 485 U.S. at 123-124. In *Praprotnik*, the Court "attempted a clarification of tools a federal court should employ in determining where policymaking authority lies for purposes of § 1983." *Jett*, 491 U.S. at 737. The Court reaffirmed that the identity of the final policymaker must be decided by reference to state law and must be determined by the trial court before a case is submitted to the jury. *Ibid.* The trial court must review "the relevant legal materials, including state and local positive law, as well as 'custom or usage having the force of law,'" and thereby "identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue." *Ibid.* (quoting *Praprotnik*, 485 U.S. at 124 n.1). Once that identification is made, the factfinder must determine whether the decisions of the policymaking authority caused the deprivation of rights at issue either by com-

manding that action occur or by acquiescing in a longstanding practice or custom of the local government. *Jett*, 491 U.S. at 737.

In *Pembaur* the Court noted that a county sheriff's decisions in regard to law enforcement practices generally would give rise to county liability because in that area the sheriff "*is* the official policymaker." 475 U.S. at 483 n.12. The Court approved of the court of appeals' conclusion that, under Ohio law, the county sheriff and prosecutor established county policy in regard to law enforcement practices. *Id.* at 484-485. In reaching that conclusion, the court of appeals in *Pembaur* had relied on a statutory scheme strikingly similar to the facts in the instant case. See *Pembaur* v. *City of Cincinnati*, 746 F.2d 337, 341 (6th Cir. 1984) (citing fact that county residents elect sheriff, county pays sheriff's salary and provides budget for sheriff's office, county provides sheriff with equipment and office necessities, and sher-iffs serve as chief law enforcement officers in each county).

Other courts of appeals have reached the same conclusion after examining similar statutory schemes in other states. As the First Circuit wrote in *Blackburn* v. *Snow*, 771 F.2d 556, 571 (1985), in Massachusetts the county is liable under Section 1983 for the sheriff's misconduct because the sheriff is "the county official who was elected by the County's voters to act for them and to exercise the powers created by state law." See also *Crane* v. *Texas*, 766 F.2d 193, 195 (5th Cir.) (per curiam) (Texas county may be held liable for the actions of its district attorney where, "much like the county itself, his office is a local entity, created by the State of Texas and deriving its powers from those of the State, but

limited in the exercise of those powers to the county, filled by its voters, and paid for with its funds"), cert. denied, 474 U.S. 1020 (1985); *Marchese* v. *Lucas*, 758 F.2d 181, 188-189 (6th Cir. 1985) (Under Michigan law, "Wayne County did not make policy for the Sheriff's Department. The Sheriff is, however, the law enforcement arm of the County and makes policy in police matters for the County."); *Gobel* v. *Maricopa County*, 867 F.2d 1201, 1208-1209 (9th Cir. 1989) (Arizona county attorney who is elected by county voters may be final policymaker for county for purposes of establishing county liability). See also *Turner* v. *Upton County*, 915 F.2d 133, 136 (5th Cir. 1990) (Texas county sheriff final policymaker in the area of law enforcement, including "investigation of crimes" and "collection of evidence"), cert. denied, 498 U.S. 1069 (1991); *Crowder* v. *Sinyard*, 884 F.2d 804, 828 (5th Cir. 1989) (Arkansas county sheriff final policymaking official for law enforcement activities), cert. denied, 496 U.S. 924 (1990); *Dotson* v. *Chester*, 937 F.2d 920, 924-932 (4th Cir. 1991) (Maryland sheriff final policymaker when operating county jail); *Lucas* v. *O'Loughlin*, 831 F.2d 232, 235 (11th Cir. 1987) (Florida sheriff "acted for the county in performing the functions for which he was elected"). But see, *e.g.*, *Thompson* v. *Duke*, 882 F.2d 1180, 1187 (7th Cir. 1989) (Illinois county not liable for the misconduct of its sheriff in his administration of the county jail), cert. denied, 495 U.S. 929 (1990).

B. The Monroe County Sheriff Has Final Policymaking Authority Over Law Enforcement For The County

The court of appeals correctly noted that "state law determines whether a particular official has final

policymaking authority." Pet. App. 6a. The court also correctly concluded that the Sheriff of Monroe County has final policymaking authority over law enforcement activities. *Id.* at 10a ("state law assigns sheriffs unreviewable state law enforcement power" within their respective counties). The court, however, improperly concluded that those activities were not "the local government's business." *Id.* at 8a.

1. *Under Alabama law, the county sheriff exercises final policymaking authority in regard to law enforcement activities for the county*

Alabama law clearly makes the county sheriff the final policymaking official in charge of law enforcement *within his county*. Alabama law specifies that "[i]t shall be the duty of sheriffs in their respective counties, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals and, insofar as within their power, to secure evidence of crimes in their counties and to present a report of the evidence so secured to the district attorney or assistant district attorney for the county." Ala. Code § 36-22-3(4) (1991). Similarly, an Alabama "sheriff is the principal conservator of the peace in his county, and it is his duty to suppress all riots, unlawful assemblies and affrays." *Id.* § 15-6-1 (1995). In the execution of that duty, the sheriff "may summon to his aid as many of the men of his county as he thinks proper." *Ibid.* Moreover, an Alabama county sheriff has no authority to enforce the law outside of his county (see *id.* § 36-22-3(4) (1991); *id.* § 15-10-1 (1995)), and state law identifies no other official or entity as authorized to make final policymaking decisions over law enforcement in a particular county. Nor does any official with state-

wide jurisdiction supervise the sheriff in the exercise of his law enforcement authority.

The fact that "Alabama law assigns law enforcement authority to sheriffs but not to counties" (Pet. App. 8a) does not mean that the sheriff acts without "county power." Indeed, that the sheriff's policies are "unreviewable" (*id.* at 10a) simply reinforces the fact that Alabama law confers on county sheriffs final policymaking authority over law enforcement matters within their jurisdictions.[4] Where an officer has policymaking authority for a governmental entity by virtue of the powers and duties assigned to his office by state law, the officer is a final policymaker of the entity under Section 1983 without regard to whether he shares that authority with any other official or entity. In Alabama, as in several other states, the sheriff is, quite simply, the "county official who was

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[4] Respondent argues (Br. in Opp. 19-21) that imposing liability on the county for the sheriff's actions is inconsistent with *Monell*, because a corporation ordinarily does not normally include both a governing board and a separate official that the board does not control. This Court, however, has held that liability under Section 1983 extends to "lawmakers *or* those whose edicts or acts may fairly be said to represent official policy." *Monell*, 436 U.S. at 694 (emphasis added); see also *Jett*, 491 U.S. at 737 ("trial judge must identify those officials or governmental bodies who speak with final policymaking authority for the local government"). Thus, the sheriff's final authority over law enforcement matters simply reflects familiar principles of separation of powers, and nothing in *Monell* supports shielding the county from liability caused by the unconstitutional conduct of one of its final policymakers. For those same reasons, respondent's argument that imposing Section 1983 liability on the county for the sheriff's unconstitutional conduct imposes liability under an "extreme * * * *respondeat superior* theory" (Br. in Opp. 25) is misplaced.

elected by the County's voters to act for them and to exercise the power created by state law." *Blackburn*, 771 F.2d at 571. Accord, *e.g.*, *Turner*, 915 F.2d at 136 ("[T]he county sheriff is the county's final policymaker in the area of law enforcement, not by virtue of delegation by the county's governing body but, rather, by virtue of the office to which the sheriff has been elected.").[5]

The court of appeals accorded undue weight to the fact that Alabama's executive office includes "a sheriff for each county" and that "sheriffs enjoy a special status as state officers under Alabama law." Pet. App. 12a-13a. As the court of appeals recognized, "a state cannot insulate local governments from § 1983 liability simply by labeling local officials state officials." *Id.* at 13a n.4. See also *Dotson*, 937 F.2d at 932 ("Although the county's *authority* to provide a service may be vested in an official designated as a state official, the county cannot be insulated from liability based on its *responsibilities* with regard to that service by the simple expedience of vesting

[5] The reasoning of the court of appeals below also appears to reflect some confusion regarding the means by which the sheriff could be vested with final policymaking authority for the county. The complaint alleged that Sheriff Tate's unconstitutional actions "were undertaken as part of an unwritten policy and custom attributable" to the county. Pet. App. 51a. This Court has made clear that consideration of state statutory and decisional law does not end the matter and that a court must also consider state custom and usage regarding the locus of county policymaking authority. *Jett*, 491 U.S. at 737. Thus, even if the court of appeals correctly concluded that state statutory law does not assign counties law enforcement duties, dismissal of the county would not have been appropriate, because the trial court should have considered whether any evidence of custom and usage supported petitioner's claims.

power in a state official" (quoting *Parker*, 862 F.2d at 1479) (emphasis added by *Parker*).). Similarly, immunity under state law does not translate into immunity under Section 1983. See *Hufford* v. *Rodgers*, 912 F.2d 1338, 1341 (11th Cir. 1990) ("State sovereign immunity may protect Sheriff Rodgers from state claims in state court; state immunity, however, has no application to claims, in federal court, under Section 1983."), cert. denied, 499 U.S. 921 (1991).[6] In any event, Alabama law has not consistently characterized sheriffs as "state" as opposed to "county" officers. See, *e.g.*, Ala. Code § 36-3-4(a) (1991) ("county officers," including sheriffs, elected to 4-year terms); § 36-15-1(1)b (Supp. 1996) (Attorney General must give legal opinions to "county or city officers," including sheriffs, when requested); § 36-22-16(a) (1991) (sheriffs paid like "other county employees").

2. Under Alabama law, counties have duties and responsibilities in regard to law enforcement by the county sheriff

Alabama law places the financial responsibility for a sheriff's law enforcement activities on the county government. Under Alabama law, a county is obligated to compensate the county's sheriff by a designated annual salary paid "out of the county treasury as the salaries of other county employees are paid."

[6] Presumably no one would suggest that counties would not be liable under Section 1983 merely because Alabama defined state officers to include all county officers and similarly immunized counties from suit. Yet until 1975 Alabama law had characterized a county as "an arm of the State * * * subject to immunity from suit which the State has." *Laney* v. *Jefferson County*, 32 So. 2d 542, 543 (Ala. 1947); see *Roberts* v. *Meeks*, 397 So. 2d 111, 113 (Ala. 1981).

Ala. Code § 36-22-16(a) (1991). Not only does state law thus expressly characterize the sheriff as a county employee, it makes clear that the county must financially support its sheriff and has the authority to provide a higher salary "by law by general or local act." *Id.* § 36-22-16(a). Alabama law also compels the county commission to "furnish the sheriff with the necessary quarters, books, stationery, office equipment, supplies, postage and other conveniences and equipment, including automobiles and necessary repairs, maintenance and all expenses incidental thereto, as are reasonably needed for the proper and efficient conduct of the affairs of the sheriff's office." *Id.* § 36-22-18; see also *id.* § 11-12-14 (1989) (county to pay for sheriff's "books, stationary, postage stamps * * * and telephones")). State law further obligates the county to pay for any special investigations by the sheriff and requires the county to audit the sheriff's request for such funding. *Id.* § 36-22-6(a) (1991). In addition, state law authorizes the county commission to pay from the county's general fund "all dues, fees and expenses of the sheriffs * * * that are incurred by such individuals through membership in and/or attendance at official functions of their state organizations," and the sheriff's membership dues in state and national sheriff's associations. *Id.* § 11-1-11 (1989); *id.* § 36-22-19 (1991).[7]

With respect to revenues, Alabama law provides that the county commission is to collect various fees

[7] In addition to paying the salary of the sheriff and fully funding all necessary expenses of the operations of the sheriff's office, certain counties are required by state law to administer a retirement system for the sheriff through the county general fund. See Ala. Code §§ 36-22-40 to 36-22-45 (1991).

and commissions that previously were collectible "for the use of the sheriff and his deputies," and pay them into the county's general fund. Ala. Code § 36-22-17 (1991). The County Commission also has the authority to direct that the sheriff pay to the county's general fund the amounts received for feeding prisoners, which the sheriff is entitled to retain absent such direction by the county commission. *Ibid.* The sheriff must render to the county treasury or custodian of county funds a periodic written statement of the moneys received by him for the county. *Id.* § 36-22-3(3).

Alabama law also provides that the county voters elect the sheriff. Ala. Const. art. V, § 138. Those voters thus have the ultimate capacity to control the sheriff's activities. The Eleventh Circuit recognized this point in *Parker*:

> From a policy point of view, county liability where the county has limited control over policy decisionmakers does not strike us as misplaced. The fact that a sheriff executes county policy with considerable autonomy from the county is undercut by the sheriff's dependence on county voters. Arguably, because an Alabama sheriff is voted into office by county residents, the sheriff is more accountable to the county electorate than to the county government. A finding of liability against the county translates into compensatory damages against the taxpayers of the county. One thus comes full circle: "[T]he compensatory damages that are available against a municipality may themselves induce the public to vote the wrongdoers out of office."

862 F.2d at 1481 n.10 (citing *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 269 (1981)).[8] In addition, citizens of the county have direct authority to require that the county sheriff make an investigation and report regarding any alleged violations of the law in the county. Ala. Code § 36-22-6(b) (1991). Under this provision, 25 reputable county citizens may sign a written request to that effect and submit it to the district attorney for the county, who must then direct the sheriff to make such an investigation and report. *Ibid.*; see also *id.* §§ 36-22-5, 36-22-6(a) (expenses of special investigation directed by attorney general or governor payable from county treasury).

3. *The Eleventh Amendment does not bar petitioner's claims under Section 1983*

Although the court of appeals did not rely on the point, respondent argues (Br. in Opp. 25) that because sheriffs have been held to be immune from suit in federal court under the Eleventh Amendment (see, *e.g.*, *Carr* v. *City of Florence*, 916 F.2d 1521, 1526 (11th Cir. 1990); *Parker*, 862 F.2d at 1475-1476; *Free* v. *Granger*, 887 F.2d 1552, 1557 (11th Cir. 1989)), the sheriff cannot "logically * * * be deemed a county policy maker." Petitioner's claims against Sheriff Tate in his official capacity, however, must be viewed as claims against the county, which is the entity the sheriff represented in carrying out the challenged

[8] Although Alabama sheriffs may be removed from office through impeachment at the state level (see Ala. Const. art. V, § 138; *id.* VII, § 174), the county's power to vote its sheriff out of office is a more realistic measure of control. Moreover, in the event the sheriff is "incompetent" or "imprisoned," the county coroner discharges the duties of the sheriff. Ala. Code. § 11-5-5 (1989).

action in this case. *Brandon* v. *Holt*, 469 U.S. 464, 471 (1985) ("a judgment against a public servant 'in his official capacity' imposes a liability on the entity that he represents"); accord *Hafer* v. *Melo*, 502 U.S. 21, 25 (1991); *Kentucky* v. *Graham*, 473 U.S. 159, 166 (1985).[9]

The fact that Alabama sheriffs, like other local government entities and officials, ultimately derive their authority from the State, is not dispositive. See *Hess* v. *Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394, 404 (1994) (noting that cities and counties do not enjoy Eleventh Amendment immunity even though "ultimate control of every state-created entity resides with the State, for the State may destroy or reshape any unit it creates"). Alabama sheriffs

[9] The court of appeals treated petitioner's claims against the sheriff in his official capacity as stating claims against the county. Pet. App. 2a n.2; see also *id.* at 35a. As such, any judgment should be payable only against the county treasury. See *Crane*, 766 F.2d at 195. See also Ala. Code § 11-3-11 (1989) (counties may "levy a general tax, for general county purposes"). Eleventh Circuit decisions have assumed that because a sheriff is a state official under state law, the state treasury would satisfy any judgments against sheriffs. *Parker*, 862 F.2d at 1475-1476; *Carr*, 916 F.2d at 1526; *Free*, 887 F.2d at 1557. We are not aware of any provision of Alabama law, however, that would authorize state funds, rather than county funds, to pay any judgment rendered against the sheriff in his official capacity in this case. Indeed, the fact that Monroe County has an insurance policy for losses arising out of law enforcement activities by county-elected officials strongly suggests that the county considers that it would be liable for judgments against Sheriff Tate in the absence of that policy. Pet. App. 77a; August 4, 1993, Motion to Intervene by Ass'n of County Commissions of Alabama Liability Self Insurance Fund. Cf. Ala. Code § 11-30-2 (1989) (authorizing counties to appropriate money to establish self-insurance funds to cover tort liabilities of county officials).

serve the counties that pay and elect them. A sheriff thus is properly viewed as a local official when he is sued for unconstitutional conduct arising from his duties as the chief law enforcement officer for his county. For those reasons, the Eleventh Amendment would bar neither petitioner's claims against the county nor petitioner's claims against the sheriff in his official capacity. See generally *Lincoln County* v. *Luning*, 133 U.S. 529, 530 (1890); *Moor* v. *Alameda County*, 411 U.S. 693, 717-721 (1973); *Mount Healthy City School District* v. *Doyle*, 429 U.S. 274, 280 (1977).

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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